No. 97-2035

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Supreme Court of the United States

OCTOBER TERM, 1997

CAROLYN PROPERTIES I, CAROLYN PROPERTIES, INC., JOIVECA CORPORATION, JLP HOLDINGS, INC., TK HOLDINGS, INC., HHC MIAMI, INC., and UNIVERSAL CONSULTANTS, LTD., CO.,

Petitioners,

—v.—

THE MITSUI TRUST & BANKING CO., LTD. and KAJIMA INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT THE MITSUI TRUST & BANKING CO., LTD. IN OPPOSITION

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July 16, 1998

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Was it lawful under the Bank Holding Company Act, 12 U.S.C. § 1972, for a bank to insist upon performance of conditions that were requested to protect against risk of loss on a loan where the borrower's construction project was millions of dollars over budget, the borrower had no construction contract with any contractor and the borrower sought a last-minute substitution of a new contractor unfamiliar with the project?

2. Was a bank correct, as a matter of Florida state law, in maintaining that a loan commitment had expired when the borrower failed to meet material conditions precedent completely unrelated to the identity of the contractor?

3. Did the Eleventh Circuit correctly award summary judgment dismissing petitioners' claims based on petitioners' sworn statements and signed documents demonstrating that material terms of their financing obligations were not met?

STATEMENT PURSUANT TO RULE 29.6

Respondent The Mitsui Trust & Banking Co., Ltd. ("Mitsui") has no parent company and no nonwholly owned subsidiaries.

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No. 97-2035

In the Supreme Court of the United States

October Term, 1997

CAROLYN PROPERTIES I, CAROLYN PROPERTIES, INC., JOIVECA CORPORATION, JLP HOLDINGS, INC., TK HOLDINGS, INC., HHC MIAMI, INC., and UNIVERSAL CONSULTANTS, LTD., CO.,

Petitioners,

v.

THE MITSUI TRUST & BANKING CO., LTD. and KAJIMA INTERNATIONAL, INC.,

Respondents.

BRIEF OF RESPONDENT THE MITSUI TRUST & BANKING CO., LTD. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This case presents the simple issue of whether a bank that has committed to extend a $27 million non-recourse loan for construction of a hotel can insist on terms and conditions to protect its investment when the borrower requests a last minute substitution of the general contractor. It further presents, in the alternative, the issue of whether the bank is required under state law to perform under a loan commitment when the borrower has failed to meet material conditions precedent completely unrelated to the identity of the contractor.

The Eleventh Circuit reviewed the record under the well-established standards applicable to motions for summary

judgment and reached the unremarkable conclusion that the borrower had no valid claims and the action should be dismissed. In so doing, it did not rest its decision on the question which petitioners now ask this Court to review. Rather, it based its decision on principles of federal law uniformly accepted in every circuit regarding a bank's right to insist on reasonable credit protection and, in the alternative, on an independent ground establishing that petitioners had no valid action as a matter of Florida state contract law. As such, the decision of the Eleventh Circuit is neither in conflict with the decisions of any other circuit, nor does it present a factual record on an issue which would affect the outcome of the case and upon which this Court should address a purported conflict among the circuits. Accordingly, the petition for a writ of *certiorari* should be denied.

STATEMENT OF THE CASE

Counterstatement of Facts

Petitioner Carolyn Properties I ("CP") was a Florida general partnership formed for the purpose of constructing, developing and operating a hotel in Miami Beach. The other petitioners (hereinafter collectively referred to as the "CP Partners") were general partners of CP, each of which was similarly formed for the limited purpose of investing in the project. Respondent The Mitsui Trust & Banking Co., Ltd. ("Mitsui") is a commercial bank organized under the laws of Japan with an office in New York City.

In late 1987, one of the CP Partners, Carolyn Properties Inc. ("CP Inc."), conceived of a project to build

a Japanese-style hotel in Miami and approached a subsidiary of All Nippon Airways. In October 1987, CP Inc. signed an agreement with that subsidiary to operate and manage the hotel under the name "ANA Hotels."

Shortly thereafter, CP Inc. invited several general contractors to provide preliminary budget estimates to construct the hotel. After thoroughly investigating its qualifications, CP Inc. decided to retain respondent Kajima International, Inc. ("KII"). CP Inc. signed a letter of intent with KII dated April 18, 1989, pursuant to which KII was to provide preconstruction services in advance of a possible future construction contract. Among other services, the letter of intent required KII to prepare an itemized guaranteed maximum price contract for the construction of the hotel based on drawings to be prepared by CP Inc.'s architect.

The decision to retain KII was made by CP Inc. independently, without any knowledge of the existence of Mitsui as a potential source of financing and approximately two months before petitioners first contacted Mitsui. Even before their first meeting with Mitsui, CP Inc. was dealing with KII on a daily basis to develop the project.

On June 12, 1989, CP Inc.'s broker submitted a loan application to Mitsui, describing the proposed project and specifying that KII would be the general contractor. Subsequent discussions between CP Inc. and Mitsui with respect to financing terms accepted as an accomplished fact that the borrowers had already selected KII as the general contractor.

On January 11, 1990, Mitsui issued a commitment letter for financing of the project in the amount of $27,000,000 that was signed by each of the CP Partners on January 26, 1990. When they signed the commitment letter, petitioners also signed the joint venture agreement that formed Carolyn Properties I. Each of the CP Partners was represented by experienced counsel.

Each CP Partner was a Florida corporation formed for the specific purpose of participating in this project, and each of them contained very limited assets which, in the aggregate, were substantially less than the amount of the requested loan. The loan was to be non-recourse to CP and its general partners. Therefore, the commitment letter contained several important provisions designed to protect Mitsui against loss and to ensure the integrity of the collateral. These provisions included: (1) a requirement that two of the CP Partners make cash equity contributions totalling $5 million; (2) a requirement that the borrowers provide a $3 million standby letter of credit; (3) a requirement that all architect's plans and specifications be complete before closing; and (4) a requirement that there be no material adverse change in borrower's financial condition.

Finally, to ensure that the hotel would be completed within budget, the commitment letter required that prior to closing KII (the general contractor selected by buyers and specified in their loan application) had to provide a guaranteed maximum price contract ("GMP contract") covering all costs of construction, including furniture,

fixtures and equipment ("FF&E").[1] The commitment letter originally was to expire on July 1, 1990, but was extended in writing four times at CP's request.

As the architects worked on the specific drawings and design of the hotel, the project began to exceed budget. KII notified CP in writing on January 18, 1990, January 23, 1990, June 26, 1990 and August 28, 1990 that the project was exceeding budget by millions of dollars even though the final plans were not yet complete.[2]

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[1] A GMP contract is a cost-plus contract with a guaranteed maximum limit on the price, *i.e.*, a price which the general contractor guarantees will not be exceeded. If the actual cost is higher than the guaranteed maximum price, the general contractor must bear those costs. Therefore, the general contractor's credibility, experience, knowledge of the project and financial strength are critical to the structure of such a transaction. Under a GMP contract, costs incurred by the general contractor are substantiated on a monthly basis and submitted to the developer and the lender for review and monitoring.

[2] Petitioners' assertions of "fact" regarding KII's estimates illustrate the lengths to which they will go to try to create an issue for this Court. (Petitioners' Brief at 2.) The estimates they purport to compare were not of the same scope: KII's initial $17.8 million figure was only for the building's shell and was based on very preliminary and incomplete drawings, while KII's $26.8 million estimate was based on 85% complete drawings and included all fixtures and equipment. And far from being "abrupt" the $26.8 million estimate came after KII had warned borrowers four times in writing that the budget would be exceeded in light of significant design changes the CP Partners were requesting.

On September 21, 1990, less than two weeks before the commitment letter (as extended) was due to expire, CP fired KII and contacted Turner Construction Company ("Turner") to be its new construction company. Turner, which was new to the project and nowhere near as familiar as KII with its drawings and specifications, provided CP with a "conceptual estimate," not even a firm bid much less a GMP contract. Moreover, contrary to petitioners' suggestion that the scope of this estimate was supposedly the same as that of KII, Turner's "conceptual estimate" did not include costs of furniture, fixtures and equipment, yet was still nearly $3 million over budget.

Mitsui was informed of the proposed last minute substitution of Turner within days. At that time, Mitsui was financing another hotel which Turner was building in Florida and which was experiencing large change orders substantially increasing the cost of construction. Mitsui noted that Turner had only provided an incomplete "conceptual estimate" of cost and had only been reviewing the CP project for two to three weeks. Mitsui was also aware that despite having granted the CP Partners several extensions of its commitment letter, a number of other obligations remained unperformed, including failure to open the required standby letter of credit.

Discovery in this action also revealed that, unknown to Mitsui at the time, CP's joint venture agreement had long since terminated according to its terms and the two principal cash equity investors in the partnership were no longer contractually bound to invest in the project. Moreover, these two CP Partners had, at the same time KII was fired, removed their funds from the Miami escrow account where they were supposed to be held for use in the project. This

was a material adverse change in petitioners' financial condition and violated a term of the commitment letter, although they did not notify Mitsui of it.

Even in these circumstances, which provided many objective reasons for substantial concern, Mitsui agreed to consider CP's proposed new general contractor Turner if the other terms of the commitment letter were met and if an additional letter of credit and a completion guaranty were provided. That proposal was made in writing by letter dated September 26, 1990.

CP did not accept Mitsui's written proposal, never completed the project drawings, never secured a firm bid from any construction contractor for a GMP contract including FF&E, never executed a final and binding GMP construction contract with any general contractor, never provided any letter of credit, and did not bring itself into compliance with several other contractual conditions to financing. Accordingly, on October 29, 1990, Mitsui formally advised CP that in light of its failure to comply with the terms of the commitment letter it had expired.

Proceedings Below

Two years later, on September 14, 1992, petitioners sued Mitsui for breach of contract, fraud, fraudulent conspiracy, promissory estoppel and unjust enrichment. Arguing that the loan commitment letter's specification of KII as general contractor constituted an unlawful "tie" between traditional lending and matters unrelated to the loan (because of alleged financial connections between Mitsui and KII), petitioners claimed that Mitsui had breached section

106 of the Bank Holding Company Act ("BHCA"), 12 U.S.C. § 1972. Petitioners also sued KII for breach of contract, fraud, fraudulent conspiracy and tortious interference.

Discovery in the case was massive and continued for more than three years. Over forty thousand pages of documents were produced by Mitsui, KII, petitioners and non-parties. Mitsui answered six sets of interrogatories, forty five depositions were taken extending over 95 days of testimony, and eight expert reports were filed.

On August 23, 1994, the district court granted a motion by Mitsui to dismiss the promissory estoppel, fraud and fraudulent conspiracy claims but denied Mitsui's motion as to the contract, unjust enrichment and BHCA claims.

On February 29, 1996, after further discovery, the district court granted Mitsui's renewed motion for summary judgment dismissing the contract, unjust enrichment and BHCA claims. In its opinion the district court reasoned that because petitioners had independently proposed that KII be the general contractor without any force or coercion from Mitsui, and because Mitsui included KII in the commitment letter at their request, there could be no violation of the BHCA regardless of whether or not Mitsui might seek to hold petitioners to their original agreement. Petitioners' Brief, Appendix D ("App. D") at 26a-28a.

By decision dated January 21, 1998, the United States Court of Appeals for the Eleventh Circuit unanimously affirmed, but on different grounds from those relied upon by the district court. Petitioners' Brief, Appendix A ("App. A"), at 10a.

Noting that notwithstanding petitioners' last minute request, Mitsui had agreed in writing that Turner could be substituted as general contractor, the appellate court reasoned that the real issue for decision was whether Mitsui's agreement to substitute Turner on additional security conditions violated the BHCA. *Id.* at 12a. Citing precedent that conditioning the extension of credit on measures designed to protect a bank's investment was "well within traditional banking practices that do not engender the anti-competitive practices that give rise to a claim under the BHCA," and further noting that under such practices a bank can legitimately re-examine its loan portfolio and reevaluate security risks (*id.* at 13a), the court determined that it was reasonable for Mitsui to consider Turner upon new terms. *Id.* at 14a.

Finally, applying standards applicable to summary judgment motions, the appellate court held:

> The record does not support a claim that Mitsui rejected Turner on the basis that Carolyn replaced KII. Turner never submitted a GMP within or outside of budget that would conform to the loan commitment. . . . Ample evidence established that, irrespective of who was selected as the general contractor, Carolyn failed to meet many of the loan conditions and provided Mitsui with valid justification not to further extend the loan commitment. Mitsui did not tie the loan to Carolyn's use of KII.

App. A at 14a (footnotes omitted). In addition, the Eleventh Circuit held that there was another obstacle to Carolyn's

claim because under Florida state law CP failed to meet many of the conditions precedent of the loan unrelated to identity of the contractor.

Significantly, petitioners do not seek review of the Eleventh Circuit's decision on either of the two grounds which formed the basis for that decision. Instead, they would have this Court review the matter based on the reasoning of the district court which the appellate court expressly stated was neither determinative nor the ground for its decision.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit's opinion stands for two wholly unexceptional propositions, neither of which warrants review by this Court:

> (1) it is not tying under 12 U.S.C. § 1972 when a bank, acting within traditional banking practices, conditions its extension of credit on measures "related to and usually provided in connection with a loan" designed to ensure that its investment is protected; and
>
> (2) under Florida contract law, a plaintiff cannot obtain damages for alleged breach of contract where it admits that it did not, and where it could not, perform the conditions precedent to closing.

Because the opinion below turns upon well-established legal principles wholly unrelated to the issue of whether "coercion" is required to establish tying under the Bank

Holding Company Act, and because the appellate court properly applied the standards for grant of summary judgment finding that no jury could reasonably find for plaintiffs on the facts presented, this case does not present "a decision in conflict with the decision of another United States court of appeals" (Supreme Court Rule 10) or any other issue important or sufficiently ripe for review by this Court. Accordingly, the petition for a writ of *certiorari* should be denied.

(1) THE PETITION SHOULD BE DENIED BECAUSE THE ELEVENTH CIRCUIT, CONSISTENT WITH THE LAW AS APPLIED IN EVERY OTHER CIRCUIT, DISMISSED PETITIONERS' CLAIMS FOR FAILURE TO MEET ROUTINE FINANCING CONDITIONS

Petitioners ask this Court to review the decision of the Eleventh Circuit in this case, alleging that the loan commitment unlawfully conditioned the extension of credit to them on the use of KII (a contractor they admittedly voluntarily selected months before seeking financing) and citing a purported conflict among the circuits on the question of whether coercion or force is a necessary element to prove tying under the BHCA.[3] However, although the district

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[3] Compare *Integon Life Ins. v. Browning*, 989 F.2d 1143 (11th Cir. 1993), with *Dibidale of La. v. American Bank & Trust Co.*, 916 F.2d 300, 306 (5th Cir. 1990), *amended*, 941 F.2d 308 (1991), and *S&N Equipment Co. v. Casa Grande Cotton Finance Co.*, 97 F.3d 337, 346 n.18 (9th Cir. 1996) (*dictum*). One may question whether a conflict is actually presented on the *facts* of *this* case and the *facts* presented by the Fifth and Ninth Circuit decisions. In this case, petitioners selected KII independently and

court's opinion rested upon a finding of fact that there was no coercion in the financing agreement's specification of KII, and hence no possible impropriety in enforcing that term, and although this point was *argued* to the Eleventh Circuit, the Eleventh Circuit *did not issue the decision* for which plaintiffs seek review here *on that ground.*[4]

Specifically, although the Eleventh Circuit's opinion summarized the district court decision and in connection with that summary articulated a coercion standard, it *never applied that standard.* Instead, it went on to state that "while we agree with the district court's dismissal of the BHCA claim, we do so *for different reasons.*" App. A at 10a,

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before they contacted Mitsui, which merely accepted petitioners' proposal to use KII in approving the loan application, whereas in both *Dibidale* and *S&N* the bank actually proposed the allegedly tied service which the borrower thereafter adopted and which was included in its written financing proposal.

[4] The district court held that merely insisting on a term of contract proposed by borrowers in a loan application where the contract had been negotiated at arms-length by sophisticated parties who were advised by counsel was not coercion under the BHCA. App. D at 28a. *See also Rayman v. American Charter Fed. Sav. & Loan Ass'n*, 75 F.3d 349 at 356 (8th Cir. 1996) ("Because [borrower] had voluntarily relinquished an absolute right to transfer servicing to an entity he controlled, his decision to accept American Charter as servicer was not the product of the coercion necessary to prove an unlawful tying arrangement."). Mitsui advanced this argument below and does not concede petitioners' argument to the contrary; however, for the reasons set forth in the text, a grant of *certiorari* is inappropriate because the Eleventh Circuit's opinion rests on other grounds.

emphasis added.[5] Thus, the decision entered by the Eleventh Circuit rests on a *different ground* unrelated to the selection of KII or indeed any requirement, coercive or not, that the loan be conditioned on petitioners' use of KII.

The question of whether coercion is required to establish tying under the BHCA is simply not presented by the Eleventh Circuit's opinion.[6] Rather, the Eleventh Circuit's decision rests explicitly on a finding that there was no tying in Mitsui's insistence that if the borrower wanted to propose a new contractor at the last minute, extension of credit under such circumstances would have to include appropriate measures to protect the bank's investment that were "well within traditional banking practices." App. A at 11a *et seq.*

Specifically, as the Eleventh Circuit found in reviewing the record, it was undisputed that Mitsui's loan

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[5] Petitioners' citations to the supposed statements of the Eleventh Circuit that the issue of coercion was determinative in this case are at App. A, at 9a, *before* the Eleventh Circuit articulated its reasons for ruling against petitioners which are found at App. A, at 10a *et seq.*, and, in particular, at 14a ("The record does not support a claim that Mitsui rejected Turner on the basis that Carolyn replaced KII").

[6] Indeed, in stating that it would decide the case on different grounds, the Eleventh Circuit observed that "this court has suggested that merely because the borrower purchased or obligated himself to purchase the undesirable product either before or contemporaneously with the loan does not necessarily vitiate a BHCA claim. If the condition was illegal, that condition, regardless of when entered, should not be enforceable." App. A at 11a (footnote omitted).

commitment to petitioners was non-recourse, meaning that Mitsui would be barred from legal action against the borrowers if the security value fell below the amount required to repay the loan. A non-recourse loan involves construction risks and property management risks as the borrower is not responsible to repay the loan except to the extent of the collateral. For this reason, Mitsui required that the general contractor provide a guaranteed maximum price contract. App. A at 11a.

The Eleventh Circuit went on to observe that when Mitsui learned shortly before the expiration of the commitment letter that petitioners had fired KII and proposed the last minute substitution of Turner, it had cause to be apprehensive. The project had dragged on for ten months and the closing had been postponed four times. *Id.* Mitsui nevertheless did not object to continuing the loan without having KII and agreed to substitute Turner if a joint and several completion guaranty from the Japanese investors, a bank letter of credit in the amount of $5 million and a GMP contract from Turner including all FF&E costs conforming to the provisions of the original commitment letter were provided. App. A at 12a-13a.[7]

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[7] Although petitioners argue that a Mitsui banker told them they had to use KII or the loan would be cancelled (a characterization Mitsui would dispute), they concede that in that conversation he also said that Mitsui would review the proposed new contractor, and it is undisputed that within a few days thereafter Mitsui offered in writing to extend the loan provided appropriate financial protections were provided. *See* Petitioners' Brief at 5-6. Under these circumstances, the Eleventh Circuit was correct in disregarding the conversation because, having been superseded by a written letter as to which there could be no

Having reviewed this extensive factual record under the standards applicable to summary judgment, the Eleventh Circuit concluded that Mitsui's re-examination and re-evaluation of the risks presented by a last minute substitution and petitioners' other circumstances were well within traditional banking practices, and that "it clearly was reasonable for Mitsui to consider Turner upon those new terms." App. A at 14a. Reviewing the undisputed record that petitioners completely failed to meet those terms, the Eleventh Circuit went on to hold that "the record does not support a claim that Mitsui rejected Turner on the basis that Carolyn replaced KII" and that "irrespective of who was selected as the general contractor, Carolyn failed to meet many of the loan conditions and provided Mitsui with valid justification not to further extend the loan commitment." *Id.*

As a factual and legal matter, the question of whether coercion is required to establish unlawful tying simply is not presented by the Eleventh Circuit's decision in this case. Although the Eleventh Circuit observed that it was nevertheless the fact that there had been no coercion in the original selection of KII (App. A at 11a), the question was academic. Mitsui did not insist on the use of KII and instead offered to allow Carolyn to substitute Turner if reasonable financial conditions were met. *Id.* at 12a. Mitsui advised CP that the loan commitment had expired only after petitioners failed to provide legitimate security assurances requested by Mitsui unrelated to the specific identity of the general contractor and numerous other terms of the financing commitment were not met. *Id.* at 13a-14a.

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dispute, it was not material. *See* App. A at 12a.

While the BHCA prohibits a bank from conditioning its loan on some "additional" credit, property or service to a bank, such a condition must pertain to matters "*other than* those related to, and usually provided in connection with a loan, deposit or trust service." 12 U.S.C. § 1972 (1)(C) (emphasis added). The legislative history of the BHCA explains further that the Act's tying prohibition was not intended to "interfere with the conduct of appropriate traditional banking practices." Senate Banking and Currency Committee Report No. 91-1084, 91st Cong., 2d Sess. (1970), reprinted in 3 U.S. CODE CONG. & ADMIN. NEWS 5519 at 5535 (1970).

As the Eleventh Circuit observed in its opinion "[c]ourts have determined that conditioning the extension of credit on measures designed to insure that the bank's investment is protected is well within traditional banking practices that do not engender anti-competitive practices that give rise to a claim under the BHCA." Moreover, it is well-recognized as a traditional banking practice "for banks to constantly re-examine loan portfolios and reevaluate the risks and security needs of [their] loans." App. A at 13a (citation omitted). These unexceptional propositions -- propositions to which the Eleventh Circuit and all other circuits which have addressed the issue (including the Fifth and the Ninth Circuits) agree -- allow banks to require additional financial assurances based on changed circumstances to protect their loans and their overall financial integrity.[8]

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[8] *Parsons Steel, Inc. v. First Alabama Bank N.A.*, 679 F.2d 242, 245 (11th Cir. 1982) (Congress did not intend to interfere with traditional banking practices or to prohibit banks from protecting their investments); *Gulf States Land & Dev. v. Premier Bank N.A.*, 956 F.2d 502, 506-07 (5th Cir. 1992) (requiring debt

The Eleventh Circuit did not decide this case on the question of whether coercion is required to establish tying under the BHCA (App. A at 10a-11a). Rather, it applied a legal standard as to which all the circuits agree -- *to wit*, the right of banks to insist on legitimate security for loan commitments (*id.* at 13a) -- and, applying that standard, found that petitioners had not provided sufficient proof to raise a material issue of fact as to their failure to provide such security or to show that Mitsui had conditioned the loan on petitioners' use of KII (*id.* at 14a). Accordingly, this case does not properly present for review any question as to which there is a conflict and the petition for *certiorari* should be denied.

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restructuring is not an unusual banking practice and no violation); *Bieber v. State Bank of Terry*, 928 F.2d 328, 330 (9th Cir. 1991) ("There is nothing anti-competitive about a bank requiring a debtor to 'put its financial house in order'").

See also Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 897 (3rd Cir. 1981), *cert. denied*, 454 U.S. 893 (1981) ("Imposition of financial controls . . . was directly related to maintaining the security of FPB's substantial investment, and the bank's demand cannot be considered unusual in the face of substantial evidence that it had good reasons to be concerned about the loan"); *Palermo v. First Nat'l Bank & Trust Co.*, 894 F.2d 363, 369 (10th Cir. 1990) ("Section 1972 was not intended to prevent the bank from taking steps to insure adequate security for its loans"); *B.C. Recreational Indus. v. First Nat'l Bank*, 639 F.2d 828, 832 (1st Cir. 1981); *McClain v. South Carolina Nat'l Bank*, 105 F.3d 898, 902 (4th Cir. 1997); *McCoy v. Franklin Sav. Ass'n*, 636 F.2d 172, 175 (7th Cir. 1980); *Rayman v. American Charter Fed. Sav. & Loan Ass'n*, 75 F.3d at 356.

(2) ALTERNATIVELY, THE PETITION SHOULD BE DENIED BECAUSE REGARDLESS OF WHETHER THERE WAS TYING UNDER THE BHCA, PETITIONERS' CLAIM WAS PROPERLY DISMISSED AS A MATTER OF FLORIDA STATE LAW

A second, independent reason for denying a writ of *certiorari* is that this contract case was properly dismissed on state law grounds completely unrelated to the BHCA. Under Florida law, the holder of a promise based upon conditions precedent cannot profit from an anticipatory repudiation of the contract, even if performance of certain conditions precedent is excused, unless he can demonstrate the ability to perform those conditions which remain. App. A at 14a-15a, citing *Hospital Mort. Group v. First Prudential Development Corp.*, 411 So. 2d 181, 183 (Fla. 1982).[9]

Applied to the facts of this case, this Florida legal standard means that petitioners could not enforce the loan commitment contract, even if the provisions regarding the identity of the contractor were invalid or excused, unless they could show that they were able to perform all the other conditions precedent set forth therein. And, as the Eleventh

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[9] Several other Florida cases also articulate this legal proposition. *See, e.g., Cohen v. Champlain Towers North Associates*, 452 So. 2d 989, 991 (Fla. 3d DCA 1984); *Slaughter v. Barnett*, 154 So. 134 (Fla. 1934); *Morely v. Trafalgar Developers of Florida, Ltd.*, 455 So. 2d 391, 394 (Fla. 3d DCA 1984). Moreover, as this Court has noted, "it is our practice to accept a reasonable construction of state law by the court of appeals even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1985).

Circuit recognized, this was an additional and independent obstacle to petitioners' claim. App. A at 14a.

Specifically, as the Eleventh Circuit concluded from a review of the undisputed terms of the loan commitment, the contract between petitioners and Mitsui included many conditions precedent specifying performance obligations by petitioners unrelated to the identity of their proposed contractor, the lack of any one of which would be material to the loan. These included obligations to have a general contractor who had committed to a guaranteed maximum price contract within budget covering not only the shell of the building, but also furniture, fixtures and equipment. *Id.* at 15a.

It was undisputed that petitioners' proffered contractor, Turner, had submitted merely an estimate, not a bid (much less a contract), that the estimate did not cover FF&E, and that it did not include a GMP. App A at 15a-16a. Moreover, the partners of Carolyn Properties had allowed their joint venture agreement to expire, the required standby letter of credit had not been provided, and sums put in escrow by CP's Japanese investors had been withdrawn calling into material question the very existence of the partnership requesting credit of Mitsui, as well as essential capitalization assumptions upon which Mitsui's loan commitment was premised. *Id.*

Thus, as the Eleventh Circuit found, plaintiff Carolyn Properties I, the holder of the loan commitment, "simply was not able to comply with the commitment letter" at any relevant time. *Id.* at 16a-17a. This failure to meet a Florida state law requirement mandated dismissal of petitioners' case, regardless of its BHCA claims. Accordingly, the

petition for *certiorari* should be denied since determination of the question of "coercion" as a requirement under the BHCA is irrelevant to this case.

(3) THERE IS NO BASIS FOR RE-EXAMINING THE LOWER COURTS' REVIEW OF THE FACTUAL RECORD OR FOR CONSIDERING, YET AGAIN, THE STANDARDS FOR SUMMARY JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 56

Perhaps recognizing the futility of their legal arguments, petitioners make a half-hearted attempt to allege that the Eleventh Circuit misapplied the standard for summary judgment. *See* Petitioners' Brief at 17, n.7. The argument is without merit.

The standards applicable to Rule 56 motions are well-established, having been articulated many times over the past twelve years.[10] The Eleventh Circuit's opinion shows that the appellate court was well aware of them as it set out to consider petitioners' claims. *See* App. A at 6a-7a, citing *Celotex Corp. v. Catrett*, *supra*. And there is no indication that the Eleventh Circuit failed to apply these well-recognized standards in holding that "the record does not support a claim that Mitsui rejected Turner on the basis that Carolyn replaced KII," that "irrespective of who was selected as general contractor, Carolyn failed to meet many

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[10] *See, e.g., Eastman Kodak Co. v. Image Technical Serv.*, 504 U.S. 451 (1992); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

of the loan conditions," and (in connection with the alternate state law ground) that "many of the items of the loan agreement which were to be in place 15 days before the closing date had not been completed nor delivered to Mitsui . . . ." App. A at 14a and 15a.

The court of appeals' decision that there could be no reasonable dispute as to the material facts was based on a careful review of all the evidence and, in particular, of admissions contained in petitioners' deposition testimony and operative documents which petitioners wrote squarely admitting that legitimate security assurances requested for the lender's financing commitment were not met. There is no reason for this Court to engage in *de novo* review in a matter where the decisions below are entitled to considerable deference. *See Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-401 (1990).

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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